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No. 84-1728

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,
v.
FEDERAL LABOR RELATIONS AUTHORITY
and
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, NATIONAL COUNCIL OF EEOC LOCALS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR UNION RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, for the limited purpose of assuring compliance with applicable law and regulation, a dispute over a federal agency's determination to contract out work performed by its employees may be submitted to arbitration pursuant to 5 U.S.C. § 7121.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 744 F.2d 842. The decision and order of the Federal Labor Relations Authority (FLRA) (Pet. App. 40a-48a) is reported at 10 FLRA 3. The FLRA's order denying petitioner's motion for reconsideration is reported at 11 FLRA 720.

JURISDICTION

The judgment of the court of appeals (Pet. App. 49a-50a) was entered on September 24, 1984. A timely petition for rehearing was denied on December 3, 1984 (Pet.

App. 38a-39a). On February 26, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

In addition to the statutory provisions set forth in the petition, at 2-3, the case requires consideration of the following.

5 U.S.C. § 7103(a)(14) provides:

> "[C]onditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—
>
> (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
>
> (B) relating to the classification of any position; or
>
> (C) to the extent such matters are specifically provided for by Federal statute[.]

5 U.S.C. § 7121 provides:

> (a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.
>
> (2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that—

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance in the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

* * * * *

5 U.S.C. § 7122(a) provides:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—
>
> (1) because it is contrary to any law, rule, or regulation; or
>
> (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;
>
> the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

STATEMENT

Respondent American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals (AFGE or union) is a labor organization representing employees of petitioner Equal Employment Opportunity Commission (EEOC or employer).

During negotiations, the EEOC refused to bargain over the union's proposals relating to the employer's responsibilities in making determinations to contract out to private enterprise work performed by bargaining unit employees (Pet. App. 40a-47a). Specifically, the employer refused to bargain over the following proposals:

Union Proposal I

> Section I—The EMPLOYER agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out.

Union Proposal II

> Section II—The EMPLOYER shall notify the council and appropriate Local President(s) of its inten-

tion to solicit bids for contract work which could result in a reduction-in-force or transfer or abolition of function affecting employees in the unit. Such advance notice shall provide a full explanation of the reasons for such actions and provide the UNION sufficient opportunity to respond in writing.

Union Proposal III

Section III—The parties shall negotiate the [e]ffect of any contracting-out decision which could alter the conditions of employment in the bargaining unit prior to implementing the decision to contract-out. The EMPLOYER agrees to eliminate or minimize any potential adverse [e]ffect through reassignment or training and to take whatever other action may be necessary to protect bargaining unit employees.

(Pet. App. 40a, 43a, 45a, 46a).

AFGE, pursuant to 5 U.S.C. § 7117,[1] appealed the employer's refusal to bargain over these proposals to the Federal Labor Relations Authority (FLRA). The FLRA declared the first two proposals negotiable, ordering the employer to bargain with the union over them; the FLRA declared the third proposal nonnegotiable as outside the statutory duty to bargain.[2]

With regard to the first proposal, which is the focus of the employer's petition, the FLRA found that it was not inconsistent with management's right to "make determinations with respect to contracting out" under section 7106(a)(2)(B) (Pet. App. 40a). The FLRA held that

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[1] Labor-management relations in the federal service is governed by Title VII of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* Title VII (the labor relations title) appears at 5 U.S.C. § 7101 *et seq.*

[2] The FLRA reasoned that this proposal created absolute employment security for employees affected by a decision to contract out unit work, thereby directly interfering with the employer's right under section 7106(a)(2)(A) to layoff employees (Pet. App. 46a-47a).

a contractual agreement whereby the employer agreed to comply with OMB Circular No. A-76 and other applicable laws and regulations relating to contracting out would not impose any substantive limitations upon management's right to make contracting out determinations apart from those already existing (Pet. App. 41a).

The FLRA also rejected the employer's contention that its right to make contracting out determinations would be unlawfully impeded in that the proposal would subject its contracting out actions to resolution by the parties' grievance procedure (Pet. App. 42a). In this regard, the FLRA recognized that questions concerning the employer's contracting out actions, even in the absence of the contract provision proposed by the union, were grievable unless the parties, through negotiations, agreed to exclude such grievances, or a particular grievance was inconsistent with law (Pet. App. 42a-43a).

The FLRA also rejected the employer's argument that a union's complaints over a contracting out decision would be solely reviewable under the procedure established by OMB Circular No. A-76 (Pet. App. 41a-42a), whereby an employer reviews its own actions.

The FLRA held that even if there was a conflict between the proposal and the Circular, the latter does not limit the statutorily prescribed scope and coverage of the grievance procedure (Pet. App. 42a).[3]

With regard to the second proposal, requiring the employer to provide the union with advance notice and opportunity to respond to the employer's reasons for considering contracting out work performed by unit em-

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[3] In reaching its conclusion, the FLRA relied upon its earlier decision in *AFGE, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 FLRA 314 (1981), where at issue was a regulation of the Office of Personnel Management which purported to exclude from the grievance procedure some employee complaints. 6 FLRA at 321.

ployees, the FLRA rejected the employer's argument that the proposal would impermissibly interfere with its right to make contracting out determinations (Pet. App. 44a). In so doing, it also found that there was no inconsistency between the proposal and federal procurement regulations calling for "economy, efficiency and effectiveness in the procurement of property and services" (Pet. App. 45a).

The EEOC sought reconsideration of the FLRA's decision (*see* Pet. App. 6a, n.9), requesting, in part, that the FLRA "explain in what fashion OMB Circular A-76 and other applicable laws and regulations concerning contracting out fall within the ambit of . . . the grievance resolution machinery under the Statute." 11 FLRA 720.

The FLRA denied the request, finding that the employer was asking the FLRA, in effect, to make arbitrability determinations in the absence of a specific factual context. *Id.*, 721. The FLRA continued by advising the employer that it could avail itself of the statutory procedure under section 7121 for resolving arbitrability questions.[4]

The employer sought review under section 7123(a) of the FLRA's decision insofar as it required negotiations over the proposal whereby the employer would agree to conform its contracting out actions to OMB Circular No. A-76 and other applicable law and regulation (Pet. App. 1a, 6a). The FLRA filed a cross-petition for enforcement (Pet. App. 6a).

A panel of the court of appeals, one member dissenting, enforced the FLRA's order (Pet. App. 1a-37a), holding that the proposal would not unduly interfere with the

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[4] Under the scheme crafted by Congress, questions of arbitrability are to be resolved, in the first instance, by arbitrators. 5 U.S.C. § 7121(a)(1). The arbitrator's ruling on the arbitrability question is reviewable by the FLRA upon exceptions filed by a party. 5 U.S.C. § 7122(a). *See* Celmer, *Substantive Arbitrability*, 81 Federal Labor Relations Reporter No. 17 (Oct. 1981).

employer's prerogative to make contracting out determinations. In reaching this conclusion, the court of appeals agreed with the FLRA's finding, in effect, that the language of the proposal merely echoed the statutory requirement that contracting out determinations, like other reserved management prerogatives affecting conditions of employment, are grievable to the extent questions exist as to their conformance with law or regulation (Pet. App. 9a). In this regard, the court observed that the proposal imposed no substantive criteria upon management's reserved authority to make contracting out determinations (Pet. App. 9a). The court continued by observing that both section 7106(a)(2)(B), which preserves management's authority to make contracting out determinations, and section 7103(a)(9) which, along with section 7121, defines the scope and coverage of grievance procedures in the federal sector, evidence that even so-called management rights are "qualified" to the extent that an employer's actions must conform to law (Pet. App. 11a-15a).

The court also held, in agreement with the FLRA, that there was no inconsistency between the proposal and the provision in Circular A-76 providing for internal agency review of complaints over a contracting out determination (Pet. App. 16a). The court reasoned that the Circular did not operate to "create" a right of appeal, an object contrary to the Circular's own terms; the right to arbitral review was created by Congress in enacting the statutory grievance procedure (Pet. App. 16a). Furthermore, the court added, that even if there was an apparent inconsistency, Congress did not intend to allow agencies, by regulation, to restrict coverage of the grievance procedure (Pet. App. 16a).

The dissenting panel member would have denied enforcement of the FLRA's order, stating that the union's proposal would interfere with the employer' prerogative to make contracting out determinations by imposing substantive criteria upon management's decisionmaking au-

thority (Pet. App. 24a). In support of this conclusion, the dissent read the second clause of section 7106(a) ("nothing in this chapter shall affect the authority of any management official. . .") as limiting the coverage of the statutory grievance procedure (Pet. App. 28a-29a). The dissent also found that even if a contracting out decision results in the loss of jobs, it does not affect "conditions of employment" within the meaning of section 7103(a)(14), which the dissent views as much less inclusive than its analog in the private sector (Pet. App. 29a-33a).

REASONS FOR DENYING THE PETITION

Through its petition, the EEOC seeks review of the unremarkable finding by the court of appeals that contracting out decisions by that agency, as an employer, are subject to arbitral review for the limited purpose of assuring that they comply with law and regulation and then only to the extent that the parties by mutual agreement, or by order of the Federal Service Impasses Panel (FSIP),[5] have agreed to extend coverage to such disputes and the disputes are otherwise arbitrable.

Despite the employer's rhetoric to the contrary (Pet. 9), the decision by the court of appeals does not open the door for "vexatious litigation" by unions, undermine the

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[5] If the parties are unable to reach agreement over a bargaining proposal, statutory procedures are prescribed for resolving the impasse. 5 U.S.C. § 7119. As an initial step, the parties may seek to utilize the services of the Federal Mediation and Conciliation Service. 5 U.S.C. § 7119(a). If agreement still cannot be reached, either party may invoke the processes of the FSIP. 5 U.S.C. § 7119(b). Its members are appointed by the President; they are familiar with government operations and knowledgeable in labor-management relations. 5 U.S.C. § 7119(a)(2). The FSIP, either upon request by the parties, or by its own order, may require the resolution of an impasse through binding arbitration; alternatively, it may order the parties to submit the impasse to factfinding with recommendations or require the use of other dispute resolution mechanisms. 5 U.S.C. §§ 7119(b)(2) and 7119(c)(5).

government's efforts to achieve cost savings through contracting out, or allow for decisionmaking by arbitrators in place of government officials. Instead, as found by the court of appeals, the FLRA's decision upholds the legality of the union's proposal to secure the employer's contractual agreement to comply with law and regulation applicable to contracting out. The FLRA's decision, consistent with the intent of Congress, merely establishes arbitration as an initial forum for determining whether the employer's actions, to the extent they are constrained by OMB Circular No. A-76, or other applicable law or regulation, conform with these legal requirements. Simply put, the decision imposes upon government managers nothing more than what is already required of them, *i.e.*, to comply, in effect, with their own rules and regulations pertaining to contracting out.

The problems which the employer envisions not only are without factual support in this case but are by no means reasonably forseeable. However, even if there was some substance to the employer's contentions, the EEOC, like other federal employers, will have ample opportunity to renew its objections to the conclusion reached by the FLRA and the court of appeals. This opportunity will arise directly in connection with an employer's exceptions to an arbitral award, reviewable by the FLRA under 5 U.S.C. § 7122(a). The opportunity for further judicial review will arise in connection with a negotiability determination by the FLRA raising contracting out issues.[6]

1. a. Contrary to the employer's suggestion (Pet. 13a-15a), neither the court of appeals, nor the FLRA, has held that an arbitrator may substitute his or her judgment for some element of the contracting out process that

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[6] The EEOC has all but conceded as much, noting that another case raising questions over the negotiability of a proposal relating to contracting out is pending with the Ninth Circuit. *Defense Logistics Institute v. FLRA*, Nos. 84-7498 and 84-7610 (argued Mar. 11, 1985) (Pet. Br. 23, n. 20).

is reserved for management determination. Rather, each held that section 7106(a)(2)(B), which preserves managerial authority to make contracting out determinations, does not foreclose arbitral review of the employer's actions to assure that they conform with applicable law. While clearly articulating that an arbitrator was not barred by operation of statute from resolving disputes relating to the contracting out process, neither the court of appeals, nor the FLRA, suggested that contracting out disputes are to be decided as a matter of course in the federal sector without first ascertaining, in a particular context, the intention of the parties whether to include such disputes under their grievance procedure or to otherwise determine the arbitrability of a particular dispute. It is only in the absence of a specific factual situation in this case, that the employer can raise the spectre of an arbitrator deciding questions of national defense or other matters within the government manager's discretion. In the unlikely event that an arbitrator would intrude upon the employer's authority in such areas, the arbitral decision is subject to review by the FLRA and perhaps by the courts of appeals, fully insuring that the government's legitimate interests will be protected.

b. The employer's argument that arbitral review would affect an agency's "freedom to act" (Pet. 14) is both puzzling and troubling. The employer certainly is not asking this court, by granting its petition, to rule either that agencies may violate law, rule, or regulation so long as those requirements are not included in a collective bargaining agreement, or that noncompliance unfettered by challenge may further the efficiency of government operations. Yet, that is precisely what its argument implies.

As previously stated, the union's proposal creates a contractual duty to do nothing more than act in accordance with existing law, rule, and regulation. OMB Circular No. A-76 contains specific procedures and rules which all executive agencies are mandated to follow.

Stating that the union proposal would allow an arbitrator's judgment to be substituted for the agency's (Pet. 14-15) is far too simplistic. It is doubtful that an arbitrator would uphold a challenge that a decision involving discretionary aspects of Circular A-76 was an actual violation of law, thereby not in accordance with the parties' contract. However, the allegation of a miscalculation of a required cost factor, as established by the Circular, likely would involve a specific and recognizable standard by which to objectively measure an agency's actions. It would seem beyond attack that an executive agency should be bound by the dictates of the Executive's own contracting out requirements.

2. Despite the EEOC's suggestion to the contrary, there is no question but that an arbitral decision raising any of the concerns discussed in the petition would be subject to review by the FLRA. The FLRA is charged with the responsibility under 5 U.S.C. § 7122 to review exceptions to arbitral awards to assure that an award is not deficient as "contrary to any law, rule, or regulation; or . . . on other grounds similar to those applied by Federal courts in private sector labor-management relations." *See* 5 C.F.R. § 2425.1 *et seq.*

The problems which the employer envisions in allowing arbitrators to resolve contracting out disputes, if they arise, therefore, would be cognizable by the FLRA.[7] The FLRA would be able to review, for example, a contention by an employer, that an arbitrator's decision interfered with a management right by substituting arbitral judgment for a matter left solely to management discretion; that an award conflicts with a provision in OMB Circular No. A-76 or other applicable law or regulation; or that the parties' agreement did not encompass any con-

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[7] For a survey of the grounds upon which review from arbitral awards may be sought in the federal sector, *see* Frazier, *FLRA Policy and Practice on Arbitration Awards: The Role of Regulation*, 81 Federal Labor Relations Reporter No. 9 (June 1981).

tracting out disputes or excepted a particular dispute from its coverage. Moreover, the FLRA would be able to decide the questions in a specific factual context, after labor and management have been given a full opportunity to develop evidence and argument, with the benefit of an arbitral decision on the issues.

Furthermore, the FLRA's regulations allow for a party taking exception to an arbitral award to obtain a stay of the award pending FLRA decision on its exceptions, where a party can demonstrate both a likelihood of success on the merits and that a balance of the equities weighs in its favor. 5 C.F.R. § 2429.8.

Indeed, employers generally have been successful in obtaining from the FLRA stays of arbitral awards [8] and stays have been granted in the cases now before the FLRA involving contracting out disputes, as identified by the EEOC at 22, n.19 of its petition. Accordingly, there is no merit to the employer's contention (Pet. 10) that arbitral review will bar agencies from going ahead with plans to contract out work. Moreover, if an employer elects to proceed with a decision to contract out work, despite a challange to its legality or a finding by an arbitrator to that effect, it is hardly unjust that the employer, as a result, may have to rehire employees who were adversely affected by the employer's unlawful actions and make them whole for lost wages and other benefits.

3. The employer's claims that arbitral review will impede the government's efforts to achieve cost savings by contracting work to private enterprise where cost-effective to do so are also unconvincing.[9] Arbitral review can en-

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[8] *See* Celmer, *Procedure for Filing Exceptions to Arbitration Awards*, 82 Federal Labor Relations Reporter No. 18 (Oct. 1982).

[9] The focus of the case has been on the employer's adherence to the provisions of OMB Circular No. A-76. However, many employers have established their own regulations governing the contracting

sure that employers correctly cost out the relative expenses of performing work "in-house" and by contract. Where an employer, by ignoring requirements imposed by law, incorrectly determines that private enterprise can perform the function in a more cost-effective manner than by government personnel, arbitral review vindicates not only the rights of affected employees but also the public's interest in having work performed in a manner which achieves the greatest savings.[10] Thus, arbitral review will serve not only to save the public monies in particular cases where an employer has violated law or regulation but will serve as a prophylactic means to ensure that government managers do not abuse the public trust in obtaining services for the government.

In this connection, it bears repeating that the FLRA's decision imposes no new requirements upon employers. Under the decision, as before, employers are required to comply with the standards imposed by OMB Circular No. A-76 and other applicable law and regulation, including the employer's own regulations, relating to the contracting out process.

4. There is no merit to the employer's claim that the court of appeals and the FLRA incorrectly interpreted the labor relations title in finding that the EEOC must bargain over the union's proposal that it agree to comply with Circular A-76 and other applicable laws and regulations concerning contracting out (Pet. 15-21).

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out process, and agencies are bound by governmentwide regulations governing the procurement of goods and services as well as general and particular statutory provisions restricting agency discretion in this area.

[10] The union must admit to astonishment over the employer's unsubstantiated claim (Pet. 9-10) that arbitral review will result in millions of dollars cost to the government's contracting out process and its suggestion that it may "halt[] it entirely." There is certainly nothing in the record of this case that would lend any support to these contentions.

As the court of appeals recognized, section 7106(a)(2)(B), which preserves managerial authority to make contracting out determinations, itself qualifies that prerogative by requiring its exercise "in accordance with applicable law" (Pet. App. 8a). The court, thus, found that the union's proposal, if agreed to by the employer or imposed by the FSIP, would merely echo, as found by the FLRA, the statutory requirement under 5 U.S.C. §§ 7121 and 7103(a)(9), that, absent a contrary agreement by the parties, the statutory grievance procedure would encompass a complaint that an employer had contravened a provision within Circular A-76 or other law or regulation relating to contracting out (Pet. App. 9a, 15a). The result reached by the court and the FLRA is a natural construction of the statutory provisions; it stands in marked contrast to the EEOC's strained construction which would dismiss, as meaningless, the limiting language "in accordance with law" from section 7106(a)(2) and impose upon the definition of "conditions of employment" under section 7103(a)(14), a stilted and unnatural reading, totally at odds with any judicial construction of that term. *See e.g., Library of Congress v. FLRA*, 699 F.2d 1280, 1285 (D.C. Cir. 1983).[11]

Furthermore, the EEOC can point to no indication elsewhere in the labor relations title or its legislative history suggesting that Congress intended that an employer's contracting out determinations would fall outside the statutory grievance procedure. At the time the statutory scheme was crafted, it was well recognized that contracting out was a routine subject of negotiations between labor and management, which often was the subject of

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[11] Contrary to the employer's suggestion (Pet. 13), the FLRA's decision does not permit arbitrators to substitute their judgment for management in making contracting out determinations. As recognized by the court of appeals and the FLRA, an arbitrator will only be applying existing law or regulation, not substituting his or her judgment for matters left to the managers' discretion (Pet. App. 9a, 41a).

arbitration. *See* Fairweather, *Practice and Procedure in Labor Arbitration* 469-93 (2d Ed. 1983); Elkouri and Elkouri; *How Arbitration Works* 501-11 (3d Ed. 1973); *see also Fibreboard Paper Products Corporation v. NLRB*, 379 U.S. 203, 211-13 (1964).

Congress, in seeking to preserve management authority in the contracting out area, chose to do so in the same manner as it did to protect managerial rights, among others, to hire, assign, layoff, retain, discipline employees, and to assign work. 5 U.S.C. § 7106(a). Congress not only qualified each "right" by restricting its exercise "in accordance with applicable laws," but it subordinated each right to the negotiation of procedures and appropriate arrangements for affected employees. 5 U.S.C. § 7106 (b). As the court of appeals aptly noted (Pet. App. 12a), if Congress had sought to exclude from the statutory grievance procedure disputes over the contracting out process, it would have utilized section 7121(c), wherein Congress foreclosed use of the grievance mechanism for disputes relating to prohibited political activities, retirement and insurance questions, suitability determinations, examination and appointment questions, and certain classification actions. Except for these subject areas, Congress envisioned arbitral review over all categories of disputes arising in the federal workplace.

The employer's case hinges upon the meaning to be attributed to section 7106(a)(1). Yet, in that same provision, Congress preserves managerial authority, among others, to direct, assign, layoff, and discipline employees. If managerial authority to make contracting out determinations under section 7106(a) operates to deny arbitral review of such determinations, then—contrary to uniform practice and existing precedent—it would logically follow that employees and their unions would be unable to grieve disciplinary actions, promotions, or reduction-in-force actions. Management, without employee recourse to the grievance mechanism, would be able to

avoid applicable law and regulation with impunity. In so doing, however, not only would the EEOC's position render the grievance mechanism a rather empty vessel, but it would also override clear legislative history, as recognized by the court of appeals (Pet. App. 14a, n. 20), that section 7106(a) does not operate to deny arbitral review of disciplinary actions.[12] Against this background, the inherent weakness of the EEOC's case becomes clear. Despite the employer's forewarning of doom, its position reduces to the proposition that Congress, in enacting section 7106(a)(2)(B), intended to deny arbitrators the authority to measure an employer's performance against standards imposed by law and regulation upon the very actions over which a grievance is filed.

Similarly, there is no merit to the contention that OMB Circular No. A-76 operates to deny arbitral review over disputes relating to the contracting out process. As the FLRA and the court of appeals held, even if there was some inconsistency with a regulatory provision which purported to establish an internal agency procedure as the sole means for challenging a contracting out decision by an agency, that provision could not override the statutory requirement that a grievance procedure, absent contrary bilateral agreement, allow for complaints over "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." *See* 5 U.S.C. § 7103(a)(9).[13]

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[12] 124 Cong. Rec. 29,183 (1978).

[13] The EEOC's reliance upon decisions relating to the grievability of issues involving national guard technicians (Pet. 21, n. 18) is misplaced. In the cases cited, it was a statutory conflict, not an alleged inconsistency between the statutory grievance procedure and applicable regulation, which was controlling. While there, the courts viewed the National Guard Technicians Act, 32 U.S.C. § 709, as more indicative of Congressional intent with regard to appeals by technicians than the statutory right to grieve under the labor relations title, the cases provide no support for the contention that a regulation can operate to restrict the right to grieve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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